BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BLANCA SANCHEZ CANO	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 198,292 & 216,695
IBP, INC.	)	
Respondent,	)	
Self-Insured	)	

ORDER

Claimant appealed the February 1, 2000 Award entered by Administrative Law Judge Pamela J. Fuller. The Director of the Division of Workers Compensation appointed Stacy Parkinson of Olathe, Kansas, to serve as Board Member Pro Tem in place of Gary M. Korte, who recused himself from this proceeding. The Appeals Board heard oral argument on July 6, 2000.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Wendel W. Wurst of Garden City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Docket #198,292 is a claim for an October 2, 1994[1] accident and a resulting back injury. Docket #216,695 is a claim for a series of micro traumas to both upper extremities and shoulders that resulted in injury on September 16, 1996, and which continued for each working day after that date. Should there be any work disability, the parties have stipulated

[1] The Application for Hearing filed with the Division of Workers Compensation alleges a December 2, 1994 date of accident. But the parties' stipulations at the regular hearing refer to an October 2, 1994 date of accident. The parties' briefs refer to both dates. Whether the accident occurred in October or December 1994, from all indications, the parties and witnesses are referring to the same incident.

that only one award should be entered for both claims. Further, the parties have stipulated that the date of accident for purposes of that one combined award would be October 2, 1994.

In the February 1, 2000 Award, Judge Fuller determined that claimant had sustained a two percent whole body functional impairment for a lumbar strain and a three percent whole body functional impairment for upper extremity injuries. The Judge denied claimant's request for a work disability and awarded claimant permanent partial general disability benefits for a five percent whole body functional impairment.

Claimant contends Judge Fuller erred. Claimant argues that she has, at a minimum, an 18 percent whole body functional impairment. Claimant also argues that she has a 16 percent wage loss and a 46⅔ percent task loss, which would create a 31⅓ percent work disability.

Conversely, respondent contends that claimant failed to prove that the alleged bilateral upper extremity and bilateral shoulder injuries were caused by working for respondent. Respondent argues that claimant performed regular-duty work for approximately one and one-half years and then voluntarily terminated her employment with respondent. Therefore, respondent contends the permanent partial general disability should be based upon the two percent whole body functional impairment rating for the back.

The only issues before the Appeals Board on this review are:

1. What is the nature and extent of injury and disability from the October 2, 1994 accident?

2. Did claimant injure her upper extremities and shoulders working for respondent?

3. If so, what is the nature and extent of injury and disability from the upper extremity and shoulder injuries?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Claimant alleges that she injured her back on October 2, 1994, and that she also injured her upper extremities and shoulders in a series of accidents commencing September 16, 1996, while working for respondent, a meat packing company.

2. Respondent stipulates that claimant injured her back at work. But respondent denies that claimant injured her upper extremities or shoulders at work.

3. On October 2, 1994, claimant felt a pop in her back while reaching to hook a piece of meat. At the time of the incident, claimant bagged meat in respondent's packaging department. According to the medical records compiled by respondent, claimant worked only light-duty jobs from December 1994 through August 1996, due to severe back pain. According to those same medical records, claimant worked as follows:

From December 13, 1994, to January 20, 1995, according to the nursing records, claimant was moved to the cutting bone guard job. In that job, claimant measured and tore fabric paper from a roll.

From January 20, 1995, to January 30, 1995, claimant worked another light-duty job, picking trim. In that job, claimant picked either fat, meat, or bone from a conveyor and tossed the pickings onto another conveyor or into a bucket.

From January 30, 1995, to February 27, 1995, claimant returned to the cutting bone guard job.

From February 27, 1995, to August 23, 1995, claimant returned to picking.

From August 23, 1995, to September 18, 1995, claimant was on personal leave. Upon returning to work, claimant returned to picking where she worked until May 10, 1996.

From May 10, 1996, to August 31, 1996, claimant then moved to labeling ground beef, another light-duty job. Labeling ground beef required claimant to remove labels from a roll and stick them on boxes. That job required no lifting of any appreciable weight, no lifting above shoulder height, and no reaching beyond 18 inches. The one pound roll of labels was the heaviest item claimant would be required to lift.

As of August 31, 1996, claimant was released to full duty and returned to the packaging department and bagging meats.

On September 30, 1996, claimant took maternity leave and remained off work until January 20, 1997.

On January 20, 1997, after returning from maternity leave, claimant returned to bagging meat, where she worked until she terminated on August 22, 1998.

But, according to claimant, she spent most of the time that she was on light duty (from December 1994 through August 1996) doing the picking job and only occasionally labeled ground beef or cut bone guard.

4. In approximately August or September 1996, before taking maternity leave, claimant began experiencing symptoms in her shoulders, which she reported to respondent.

Claimant attributes those symptoms to constantly lifting her arms and reaching for product while picking. Claimant testified as follows:

> Q. (Mr. Ausemus) . . . What weight of meat were you picking, if you recall?
>
> A. (Claimant) This was not heavy at all. It was just basically the trimmings, the leftover pieces of meat like when they trim the meat and they might get a -- they might do the wrong cut and they go deep enough to cut the meat. So it was not lifting.
>
> Q. As you were doing that job of picking, did you begin to develop some pain and discomfort in your arms and shoulders?
>
> A. Yes. I developed a lot of pain on my right and my left shoulder due to the table in the area where I was[,] was kind of high.
>
> Q. Okay. How high was that?
>
> A. I think it was probably up to -- a little bit -- (Indicating) And I did a lot of lifting my arms to kind of reach and then I would use this hand [the right] a lot, and I would rotate, but it was constant.[2]

5. Despite having symptoms in her shoulders, elbows, and hands, claimant tolerated the light-duty work. Claimant often complained to the company nurses, but only received shoulder rubs.

6. After maternity leave, claimant was returned to bagging meat. That job required claimant to stand at the short rib table for eight hours, twist at the waist, and reach out with a hook to pull meat off the table. Claimant described the job as follows:

> The short rib table, I would stand there for eight hours, I would pull the meat off the table . . .
>
> . . .
>
> Then I would have to use a hook at the time, because me and the girl that was there would switch. I had to use a hook and I had to reach for the meat, and set it up in two pieces and then hand it over to the girl that was beside me; and that twisting, I would do a lot of twisting when I was doing that, and I was creating a lot of problem and a lot of pain for me, because I would do that all the time.

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[2] Deposition of claimant, November 15, 1999; p. 5.

. . .

> I would probably say -- I couldn't really tell you for sure, but it [reaching] was probably about 18 inches, 19 inches; it was quite far; sometimes I would have to stretch, you know, my body to reach.[3]

Claimant described the bagging job as constant, repetitive work, which increased her symptoms. Claimant testified that a bag of short ribs contained four pieces of meat and weighed 19 pounds. In performing that job, claimant would pick up two pieces of meat at a time and use an automated stuffer to push the meat into a plastic bag. Occasionally the belt would be full or broken down and claimant would be required to lift the bagged meat.

7. The bagging job caused claimant's back to throb and spasm and her shoulders to hurt. When claimant reported to the company nurse that her condition was worsening and that she could not continue to do that job, claimant was told that respondent did not have anything else for her to do and that she would have to leave if she were unable to do her job. Because claimant did not believe she could continue doing the bagging job, she then began looking for other jobs both inside and outside the meat packing plant. Claimant applied for three positions within the company – two office jobs and a picking job. When claimant found a job outside the company, she advised a company nurse that she was leaving because of her back problems and also advised the personnel office that she was leaving because the work was too hard for her.

8. Claimant's last day of work for respondent was August 22, 1998. Several days later, on August 26, 1998, claimant began working for her local school district. At the time of the regular hearing, claimant testified that she was working for the school district as a para coordinator and translator earning $8.35 per hour, or $334 per week. But later at her November 1999 deposition, claimant indicated that she was earning $8.45 per hour, or $338 per week.[4]

9. At her attorney's request, claimant was evaluated by Aly M. Mohsen, M.D., a physician board-certified in physical medicine and rehabilitation, disability evaluations, occupational medicine, forensic medicine and electromyography. Dr. Mohsen saw claimant on January 16, 1997 (before claimant returned to work from maternity leave) and diagnosed (1) traumatic myofascial pain syndrome in the lower cervical and upper thoracic areas and associated residual scapulocostal syndrome and (2) cumulative trauma disorder of both upper extremities, which includes bilateral rotator cuff tendinitis and bursitis,

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[3] Transcript of Proceedings, September 16, 1999; pp. 26, 27.

[4] Claimant's brief is also inconsistent. Page 13 refers to $8.35 per hour but page 19 refers to $8.45 per hour.

bilateral lateral epicondylitis, and tenosynovitis of the long flexor with bilateral median nerve entrapment. The doctor found certain objective findings that supported the diagnoses – muscle spasm, loss of passive range of motion, and trigger points.

Using the fourth edition of the AMA *Guides to the Evaluation of Permanent Impairment* (the *Guides*), Dr. Mohsen rated claimant as having an 18 percent whole body functional impairment, which the doctor broke down as follows: 11 percent for each of the upper extremities and seven percent for the cervical and thoracic spine. Additionally, the doctor recommends that claimant limit her constant lifting to 10-15 pounds, frequent lifting to 15-20 pounds, and occasional lifting to 20-30 pounds; and limit activities that require hand tools to an occasional basis.

At his deposition, Dr. Mohsen was not asked to give and, therefore, did not provide a task loss opinion.

10. In March 1997, at her attorney's request, claimant's neck, upper extremities, and shoulders were examined and evaluated by orthopedic surgeon J. Mark Melhorn, M.D. Dr. Melhorn diagnosed painful right and left upper extremities, including the shoulders and neck. Although the doctor examined claimant's cervical and thoracic spine, the doctor did not examine or evaluate the low back.

As set forth in the doctor's March 13, 1997 letter to attorney Stanley R. Ausemus, Dr. Melhorn would generally restrict claimant to medium work activities. The doctor wrote:

> With regard to work guides, at this time, based on her FCE, it would appear that she can perform a regular work activity. I believe on a long-term basis she would benefit, based on subjective complaints, to consider a medium level work defined as 50 lb maximum, 25 frequent, rotate tasks. I would suggest that she limit power and vibratory tools to 4 hours or less per 8 hour day, broken into 1 hour per 2 hour periods.
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> At this time, it is unlikely that she will result in improvement with additional treatments, therefore, I would suggest permanent guides with regard to the work environment.

When asked if claimant's bagging job fit within claimant's restrictions, Dr. Melhorn answered that it depended upon whether the job had task rotation built in to it.

At his deposition, Dr. Melhorn was not asked to give and, therefore, did not provide a functional impairment rating or a task loss opinion.

11. Administrative Law Judge Kenneth S. Johnson requested that claimant be evaluated by orthopedic surgeon C. Reiff Brown, M.D. Dr. Brown examined claimant on July 8, 1997, and diagnosed (1) a lumbar strain or sprain as a result of the December 2, 1994 accident,

(2) an overuse problem of the upper extremities, mainly in the form of mild biceps and rotator cuff tendinitis, and (3) possibly a mild myofascial pain syndrome still present. In his evaluation, Dr. Brown ruled out lateral epicondylitis, carpal tunnel syndrome, and tendinitis of the hand.

Using the third revised edition of the *Guides*, Dr. Brown rated claimant as having a two percent whole body functional impairment for the lumbar spine. Using the fourth edition of the *Guides*, the doctor rated claimant as having a four percent impairment to the right upper extremity and a two percent impairment to the left upper extremity, which combine for a three percent whole body functional impairment.

Because of the lumbar spine injury, Dr. Brown believes that claimant should never lift over 60 pounds and limit frequent lifting to 30 pounds. Because of the upper extremity and shoulder injuries, claimant should avoid frequently using the hands above shoulder level, frequently reaching more than 18 inches, no lifting above the shoulders, no lifting more than 12 pounds occasionally at trunk level, and no lifting more than seven pounds frequently. Additionally, pushing and pulling should be limited to double the lifting restrictions but should not exceed the 18-inch limit.

The doctor reviewed a videotape furnished by respondent that purportedly portrayed claimant's job as a short-rib bagger.[5] The doctor testified that the job portrayed would not violate the medical restrictions that he would place on claimant.

Dr. Brown reviewed vocational rehabilitation consultant James T. Molski's task list, which contained the work tasks that claimant performed in the 15-year period before her accidents, and identified seven tasks out of a total of 15 (approximately 47 percent) that claimant could no longer perform because of her work-related injuries and the related medical restrictions.

12. Based upon the greater weight of the evidence, the Appeals Board finds that claimant's work activities caused an overuse injury in both of claimant's upper extremities and shoulders. Therefore, claimant should receive workers compensation benefits for both the initial back injury and for injuries to the upper extremities and shoulders.

13. The Board affirms the Judge's finding that claimant sustained a five percent whole body functional impairment, which is comprised of a two percent whole body functional impairment for the low back injury and a three percent whole body functional impairment rating for the upper extremities and shoulders. Based upon Dr. Brown's testimony, the Board also finds that claimant has lost the ability to perform 47 percent of her former work

[5] Claimant testified that the job videotaped was not representative of the short-rib bagger job that she performed. And claimant's testimony in that respect is uncontroverted.

tasks that she performed in the 15-year period before her work-related accidents and injuries.

14. The bagging job that respondent assigned to claimant was not appropriate as it did not provide for task rotation, which Dr. Melhorn believed that claimant should observe. Additionally, the bagging job also required claimant to reach beyond those limits which Dr. Brown believed claimant needed to observe. The fact that claimant's symptoms progressively worsened while she performed the bagging job is also strong evidence that such a job was not appropriate in light of claimant's injuries.

CONCLUSIONS OF LAW

1. The Award should be modified to increase the permanent partial general disability from five percent to 32 percent for the period commencing August 23, 1998.

2. Because a back injury and bilateral upper extremity injuries are "unscheduled" injuries, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . . (*Copeland*, p. 320.)

3. Claimant made a good faith effort to continue working for respondent. Claimant complained to the company nurses of her increased symptoms and was told that she would have to quit if she could not do her job. Claimant applied for lighter jobs within the meat packing plant but was not successful. Left with no other alternative, claimant then found work with the local school district. Because of the good faith that claimant has demonstrated, the post-injury wage for the wage loss prong of the permanent partial general disability formula should be based on claimant's actual wages.

4. As indicated above, the parties stipulated that only one award should be entered in the event claimant was entitled to receive a work disability and that the date of accident should be October 2, 1994. Therefore, as claimant earned a comparable wage while continuing to work for respondent through August 22, 1998, the permanent partial general disability through that date should be based on the five percent whole body functional impairment rating.

But after August 22, 1998, claimant's permanent partial general disability is 32 percent, which is an average of the 47 percent task loss and the 17 percent wage loss.[8]

5. The Appeals Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board modifies the Award and increases the permanent partial general disability from five percent to 32 percent for the period commencing August 23, 1998.

Blanca Sanchez Cano is granted compensation from IBP, Inc., for an October 2, 1994 accident and resulting disability. Based upon an average weekly wage of $407.25, for the period from October 2, 1994, through August 22, 1998, Ms. Cano is entitled to receive 20.75 weeks of permanent partial disability benefits at $271.51 per week, or $5,633.83, for a five percent permanent partial general disability.

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[8] The wage loss is determined by comparing the $338 per week that claimant was earning post-injury to the parties' stipulated pre-injury average weekly wage of $407.25.

For the period commencing August 23, 1998, 112.05 weeks of benefits are due at $271.51 per week, or $30,422.70, for a 32 percent permanent partial general disability and a total award of $36,056.53.

As of September 15, 2000, there is due and owing to the claimant 128.61 weeks of permanent partial general disability compensation at $271.51 per week in the sum of $34,918.90, for a total due and owing of $34,918.90, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $1,137.63 shall be paid at $271.51 per week until paid or further order of the Director.

The Appeals Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
Wendel W. Wurst, Garden City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director